UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMIE LAMONT JONES,	:	07 Civ. 6587 (LAP)
Petitioner,	:	MEMORANDUM & ORDER
v.	:	
THOMAS POOLE,	:	
Respondent.	:	

LORETTA A. PRESKA, Chief United States District Judge:

In 2003, Pro se Petitioner Jamie Lamont Jones was tried and convicted by jury in the Supreme Court of the State of New York of two counts of Assault in the First Degree (N.Y. Penal Law § 120.10) and one count of Criminal Possession of a Weapon in the Second Degree (N.Y. Penal Law § 265.03). Petitioner now brings this Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus (the "Petition").

On August 29, 2008, Magistrate Judge Francis issued a thorough Report and Recommendation ("the Report") [dkt. no. 13] recommending that this Court grant the Petition. Within the ten day objection period, this Court received Petitioner's and Respondent's objections to the Report.

Having considered the objections and upon de novo review of the Report, see 28 U.S.C. § 636(b)(1); Fed. R.

Civ. P. 72(b), this Court concludes that Petitioner's application for a writ of habeas corpus must be DENIED.

I. BACKGROUND

By Indictment No. 622/02, Petitioner was indicted on one count of Attempted Murder in the Second Degree (N.Y. Penal Law §§ 110, 125.25), two counts of Assault in the First Degree (N.Y. Penal Law § 120.10), two counts of Criminal Possession of a Weapon in the Second Degree (N.Y. Penal Law § 265.03), one count of Criminal Possession of a Weapon in the Third Degree (N.Y. Penal Law § 265.02), and one count of Assault in the Second Degree (N.Y. Penal Law § 120.05).

On or around March 10, 2003, Petitioner was tried by jury in the Supreme Court of the State of New York, before Justice Edward McLaughlin (the "trial court"). The jury convicted Petitioner of two counts of Assault in the First Degree and one count of Criminal Possession of a Weapon in the Second Degree.

Evidence at Trial

Eliphelety Gonzaga and Michael Leslie were the People's primary witnesses. They testified that on December 12, 2001, they were walking along 112th Street in

Manhattan on their way to a grocery store. (Tr. at 328-29, 356, 394-95.) Two days earlier, on December 10, Mr. Leslie had gotten into a fistfight with Henry McCall after Mr. McCall tried to steal Mr. Leslie's necklace. (Tr. at 399-400, 410.) Mr. McCall left after the fight but returned later with a gun and shot at Mr. Leslie, grazing his neck with a bullet. (Tr. at 400.) Mr. Gonzaga had been with Mr. Leslie during that shooting. (Tr. at 401.)

As Mr. Gonzaga and Mr. Leslie were walking to the grocery store on December 12, Mr. Leslie stopped to tie his shoe and to talk to a friend while Mr. Gonzaga proceeded alone to the corner of 112th Street and First Avenue. (Tr. at 394-95.) According to Mr. Gonzaga, he was approached at the corner by Mr. McCall and four other men, including Petitioner. (Tr. at 329-30, 353-55.)

These men formed a "half circle" blocking Mr. Gonzaga's path, then pulled out guns, aimed at Mr. Gonzaga and began shooting. (Tr. at 330-32, 339-40, 353-55.) According to Mr. Gonzaga, Mr. McCall, Petitioner and one of the other men had guns. (Tr. at 330-33, 338.) Mr. Gonzaga testified that Petitioner aimed and shot at Mr. Gonzaga's head. (Tr. at 330-31.) Mr. Gonzaga testified that he was unarmed. (Tr. at 381). Several shots were fired, one of which hit Mr. Gonzaga in the head, rendering him blind in

the left eye. (Tr. at 332-34, 396.) Another shot apparently hit a bystander, Angela Gutierrez, in the left ankle. (Tr. at 449-53, 453.)

Mr. Leslie testified that he arrived shortly after the shots were fired, at which point he saw Petitioner standing very close to Mr. Gonzaga and then running away down First Avenue "reaching back into his jeans" as if "putting something in or taking something out." (Tr. at 395-96, 398-99.) Mr. Leslie did not see anyone fire a shot and did not see who had a gun. (Tr. at 395-96.)

Two police officers testified that they were on patrol at First Avenue and 115th Street on December 12, 2001, and heard shots fired. (Tr. at 448-49.) The officers drove to the corner of 112th Street where they found a "chaotic" scene with officers and civilians gathered around Ms. Gutierrez, who had been taken to a parked van. (Tr. at 448-50.) Another officer, Detective John Gisonno, testified that when he arrived at the scene and searched the surrounding areas he found Mr. Gonzaga slumped in a hallway outside his apartment, bleeding from the head. (Tr. at 481-82, 501-02.) No weapons were found on Mr. Gonzaga or at the scene of the crime. (Tr. at 482-86.)

For Petitioner's case, Petitioner's counsel called another witness to the shooting, Angela Lacayo, in order to

present an alternative version of the events of December 12. Ms. Lacayo testified that she was a home health attendant to Ms. Gutierrez and was accompanying Ms. Gutierrez down First Avenue toward 112th Street on the evening of December 12. (Tr. at 554-55.) Ms. Lacayo saw a tall, thin Latino man walking east on 112th Street toward First Avenue and two tall, skinny black men walking up First Avenue toward 112th Street. (Tr. at 555-56, 563-64.) These three men, and only these three, converged at the corner. (Tr. at 556, 579-80.) She then saw the Latino man "lift up his shirt" and pull out a gun. (Tr. at 556.) One of the two black men also pulled out a gun, and he and the Latino man began shooting at each other. (Tr. at 556-68.) There seems to have been some confusion with the translation of Ms. Lacayo's testimony about whether the two shooters took out their guns, walked towards each other, and then began shooting or whether they "took out the arms and they just started to shoot." (Tr. at 565-567.) At one point, Ms. Lacayo testified that "[t]he Latino man took out his gun and then the black man took out the gun as well and then they moved away and they started to shoot out," (Tr. at 567), while later in her testimony, Ms. Lacayo said the two men drew their guns "at the same time," walked away and then started to shoot (Tr. at 593). In any event, Ms.

Lacayo testified that the two shooters backed away from each other while exchanging gunfire and then fled in opposite directions. (Tr. at 564-65.) Ms. Lacayo did not see whether either man was injured. (Tr. at 587-88.)

Ms. Lacayo testified that the events unfolded "quickly" and that just after the shooting started, Ms. Gutierrez fell down and started bleeding from the leg. (Tr. at 559-60, 585-87.) At trial, Ms. Lacayo did not recognize or identify Petitioner as one of the men she saw in the shootout. (Tr. at 589.) She testified that she did not see whether the second black man had a gun. (Tr. at 556.)

Neither Petitioner nor Mr. McCall testified at the trial. However, a statement that Petitioner gave to Detective Gisonno after his arrest was read as evidence. (Tr. at 490-91, 493-94.) In that statement, Petitioner claimed to have been in the vicinity of the shooting, to have seen a number of people including Mr. McCall arguing on the corner, and to have left the scene when he heard shots fired. (Tr. at 494.) He testified similarly to the grand jury, and that testimony was also read as evidence. In that testimony, Petitioner identified Mr. Gonzaga and another man known as "Black" as two of the men arguing on the corner with Mr. McCall. (Tr. at 513-14.) He also said that a Latino or light-skinned black man was one of the men

who fired at Mr. Gonzaga. (Tr. at 518-32.) He claimed not to have seen a weapon or to have seen anyone else fire shots. (Tr. at 531.)

In closing arguments, Petitioner's counsel advanced the theory that Petitioner was not involved in the shooting. He stated, "Gonzaga pulled out a gun and started shooting at a tall, thin, black male who returned fire . . . [Petitioner] is not that tall, thin black male." (Tr. at 655-56.)

Request to Charge on Justification

At the close of the testimony, defense counsel requested that the trial court instruct the jury on justification. The trial court refused on the basis that a justification charge would be inconsistent with the versions of events presented by both the prosecution and the defense. (Tr. at 626-27.) The defense renewed its request for a justification charge after summation and again after the court delivered its instructions to the jury. The trial court denied the application each time. (Tr. at 711, 773.)

Instructions on the People's Burden

The trial court began its jury instructions by telling the jury that it was the exclusive trier of facts, it was required to decide the case on the evidence presented at trial, and that each juror could resolve any discrepancies in his or her recollection of the evidence by asking that testimony be re-read or by consulting fellow jurors. (Tr. at 712-15.) The trial court explained that facts could be found in one of two ways: either by accepting the evidence on its face or by drawing inferences from the evidence. (Tr. at 714.) The trial court advised the jury that the Petitioner was "entitled to all the factual inferences in his favor which can be reasonably drawn from the evidence" and that if two inferences could be drawn, the Petitioner was "entitled to the inference of innocence." (Tr. at 715-16.)

The court also informed the jury that the elements of the crimes charged "have to be proven beyond a reasonable doubt." (Tr. at 716.) The court advised the jurors:

> When a jury finds a fact, it has to be done fifty-one to forty-nine. When a jury finds that the People have failed to or have met an element, that's beyond a reasonable doubt, that's where the standard beyond a reasonable doubt is applied. It's on the elements, not on the individual factfinding, because in a case, it is a mosaic. You figure out what pieces go into the puzzle. It is the prosecution's obligation to

> put things in the case that you can use to decide whether a fact exists directly by inference is fifty-one/forty-nine [sic]. The elements, however, must be proven beyond a reasonable doubt.

(Tr. at 716-17.)

The trial court reminded the jury that it must decide who to believe and that a single witness's testimony could satisfy the People's burden of proof beyond a reasonable doubt. (Tr. at 716, 720-21.)

Thereafter, the trial court described the People's burden of proof in more detail. The trial court emphasized that the Petitioner was presumed innocent and that the presumption of innocence remained until the jurors were convinced that the proof established Petitioner's guilt of one or more of the crimes charged beyond a reasonable doubt. (Tr. at 721.) The trial court reiterated that the law "places [this] burden entirely on the People," where it "remains continually and perpetually," and emphasized that Petitioner bore no burden of proof and that "the fact that he called a witness does not in any way shift the burden to him." (Tr. at 722.) The trial court then defined "reasonable doubt" as,

> the standard American criminal law burden of proof that applies everywhere. And, of course, as a definition, a reasonable doubt means a doubt based upon reason. It is a doubt of the head and not the heart. It is a doubt which remains after

> discussing the case in the jury room. It must, however, be a doubt based on the evidence or the absence of evidence in this case. It is not a theoretical exercise that relates to what you're exposed to during the course of this trial.
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> A reasonable doubt means an actual doubt, a doubt you are conscious of having after reviewing in your mind all of the evidence and after giving careful consideration to all of it. If at that time you feel uncertain or are not fully convinced that a defendant is guilty, and if you believe that a reasonable person hearing the same evidence would not convict, then that is a reasonable doubt and the defendant would be entitled to a verdict of not guilty accordingly.
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> On the other hand, this does not mean that a reasonable doubt may be based upon a feeling, a whim, a guess, surmise or speculation or conjecture, nor may it be considered a kind of fence or shield behind which a juror may seek to hide in order to avoid doing a painful or disagreeable duty.
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> Also, there is no obligation on the part of the People to establish the elements of a crime beyond all doubt, because that would be virtually impossible, given all the facts there are that relate to testimony and of human beings. However, the People's obligation is to prove the defendant's guilt beyond a reasonable doubt.

(Tr. at 722-23.)

The trial court then instructed the jurors on the concept of accessorial liability as described more fully below. The trial court explained that in order to prove the accessorial liability, the People had to prove beyond a reasonable doubt that Petitioner was either a principal or an accessory. (Tr. at 725-30.) The court emphasized that

the jury must unanimously agree as to which role, if any, Petitioner played in the crimes charged. (Tr. at 740.)

After defining the concept of intent (Tr. at 731-32), the trial court instructed the jurors on the elements of the crimes charged, reminding them, once again, that "[i]t's the People's obligation to prove each element beyond a reasonable doubt." (Tr. at 733.) The trial court next discussed the charges that the jury had to consider (Tr. at 734-52), stressing twelve times that the People had to prove the various elements of those crimes beyond a reasonable doubt (Tr. at 736-37, 740, 744, 747, 751-52).

The trial court advised the jury that the verdict on each count could be different, stating once again that "the People's obligation is to prove a crime charged beyond a reasonable doubt. If they do, you must convict. If they fail, you must acquit." (Tr. at 752.) The trial court then stated:

> When you get into the jury room, there's undoubtedly going to be things to talk about and there might even be things to argue about. That's been known to happen. The pool from which the jurors come is the same pool from which the electorate comes. And in elections, there are close counts. In elections, fifty one beats forty-nine point nine every time, and even if the person is [a] loser, they're a winner and you're stuck with them for two or six years and the case of some judicial elections, fourteen years.
>
> For over two hundred and thirty years, the same pool of people that has never elected

> anybody by acclimation [sic] has been deciding unanimously in criminal cases. How does that happen? It happens, obviously, because during the course of deliberations, people change their minds.

(Tr. at 752-53.) The trial court then told the jurors how they should attempt to resolve their differences and reminded them that the verdict had "to be the individual verdict of each of the twelve voting jurors." (Tr. at 753-54.)

Sometime after the jury began its deliberations, it sent a note to the trial court "ask[ing] for a statement of how certain a juror must be of a finding of fact on which guilt or innocence crucially depends." (Tr. at 788.) The trial court consulted with the People and Petitioner's counsel and proposed to re-instruct the jury that "[a] fact is fifty-one/forty-nine, the verdict and elements, has [sic] to be beyond a reasonable doubt." (Tr. at 789.) When the court asked the parties for their positions, Petitioner's counsel responded, "It's a fact, it's beyond a reasonable doubt. I don't think it's fifty-one/forty-nine." (Tr. at 789.) Counsel requested that the court "charge them that the People must prove the charges beyond a reasonable doubt proving any essential facts." (Tr. at 789-90.)

The trial court instructed the jury:

> Because the People must prove elements of a crime beyond a reasonable doubt, it follows that if a fact is crucial, to use your word, on guilt or non-guilt, then such a fact on which proof beyond a reasonable doubt hinges, would have to be established beyond a reasonable doubt before a juror could be satisfied that an element was proven to that standard.
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> Not every fact in a case must be proven beyond a reasonable doubt, but if a fact's existence is indeed critical or necessary to establish an element necessary for a guilty verdict, then that fact must be proven beyond a reasonable doubt.
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> Jurors may arrive at their individual verdicts differently, but if a fact's existence is so critical that no reasonable person could find guilt beyond a reasonable doubt without that fact, then it must be established beyond a reasonable doubt, for example, identity.

(Tr. at 792.)

Accessorial Liability Instructions

As to the trial court's charge on the People's theory of accessorial liability, the trial court stated that if two or more people "are acting with a common purpose," and if "any among them do an act which is designed to further the common purpose," then all of those individuals could be "found guilty," provided that they also "had the mental element" required for the offense. (Tr. at 725-26.) The trial court explained that "[t]he law says that a person can be criminally liable for the acts of another person," and under those circumstances "the acts of one are

attributable to the other so that even somebody who hasn't done one act during the course of this event can be liable." (Tr. at 726.)

The trial court then instructed the jurors that "for the People to rely on this in concert or joint responsibility theory," they had to prove "two things beyond a reasonable doubt"--that the principal had the "mental element" defined by the applicable criminal statue and that the "non-actor" had either "direct[ed] the other person to do an act" or "intentionally aid[ed] the other person by doing an act that somehow furthers the common purpose." (Tr. at 727-28.)

The trial court provided two hypothetical examples to illustrate the mutual-intent requirement. The first involved a gunfight. (Tr. at 727.) The trial court told the jurors that if two people intended to injure "the person at whom the gun is pointed," and if one "fired and missed" or did not even "have a gun," "the one who fired and missed or the one who threatened with a gun but didn't fire" would be just as guilty as the one who succeeded in shooting the victim, provided that "they had a common goal." (Tr. at 727.) In the second hypothetical, the trial court described the burglary of a warehouse, where one person was the getaway driver, another helped carry away

the stolen property, and the third was the one who entered the building. The court told the jury, "[e]verybody knows what's going on" when they "drive up to [the] warehouse." Under those circumstances, said the trial court, "[a]ll three of them are guilty of burglary"; the person who drove the getaway car "is as guilty as if he or she went into" the building or had "carried away the property." (Tr. at 727-28.)

The trial court then told the jurors that, with respect to the requirement that the "non-actor" "directed" or "intentionally aided" the principal, "any act, however big or small, however successful or unsuccessful," could be used to prove that the two individuals had acted in concert, provided that the act was "intentionally done" to "further the common purpose" and that the individuals "simultaneous[ly]" shared the "mental element" of the crime charged. (Tr. at 728.) The trial court cautioned the jurors that merely being "present at a place . . . where a crime takes place" would not support a finding of accessorial liability if the "non-actor" did not possess the requisite criminal intent. (Tr. at 729.) Likewise, the trial court explained, mere "know[ledge] that a crime is going to happen" would be insufficient if the "non-actor" lacked the requisite criminal intent--even if he did

"something that is not intended to further the common purpose but somehow accidentally furthers the common purpose." (Tr. at 729.)

Describing a hypothetical orchestra, the court stated that the conductor who "participat[ed] throughout" and the musicians who did "different things at different times" all acted in concert. The trial court added that even the musician who played for a "brief moment is as much a part of the performance as anybody who's performed during the event." (Tr. at 729-30.) The trial court also explained that determining whether two or more people had acted in concert did not require the jury to apportion liability: "It's like pregnancy. You are either in it or not. . . . [Y]ou are either a little involved or you're not involved. You are either a lot involved or you're not involved. Percentages don't matter." (Tr. at 730.) The trial court also told the jurors that, to convict petitioner of assault, they had to be in unanimous agreement that he "fired" the gun, or acted in concert "with whoever the shooter was." (Tr. at 740.) Petitioner did not object to any part of these instructions. (See Tr. at 754-58.)

During the first day of its deliberations, the jury sent a note asking for "[a] statement of the elements of a crime carried out . . . 'in concert' . . . in particular,

the definition of an 'action' . . . by the defendant guilty of acting in concert, even if he is not the shooter." (Tr. at 773.) When Petitioner's counsel asked the trial court to deliver "the CJI on accessorial liability," the trial court stated that the jurors "seem to want something on the intent to assist part of the acting in concert concept." (Tr. at 774.) Because the jury appeared to be focusing on the requirement that a non-actor "intentionally aid in some way, however great or small," the trial court told the parties that it would address that issue specifically and, in addition, would reiterate the "mere presence" caution that it had given in its final charge. (Tr. at 774.)

The People suggested that the trial court "restate what it had stated on [the] original charge" and, in particular, that it repeat the orchestra "analogy." (Tr. at 774-75.) The trial court responded that, because the jurors had "use[d] the phrase 'non-shooter,'" it appeared that they were "looking for a little bit more guidance" about "what they [should] do in a multiple [actor] situation where more than one person is mentally liable, but not everybody is a shooter." Thus, the trial court resolved "to attempt to deal somewhat meaningfully with a situation where a non-shooter acts." (Tr. at 775.)

The trial court proposed another hypothetical, where a person in one state solicits a person in another state to commit a murder. (Tr. at 776.) The People objected to that example, on the ground that "this isn't a solicit or request case and . . . that analogy implies that it is." (Tr. at 776.) Petitioner's counsel agreed and asked the trial court not to give additional hypothetical examples but, instead, to "give the current full CJI charge on accessorial liability," including the cautionary "mere presence" language. (Tr. at 777-78.)

The trial court told the parties that it was not "merely going to give [the jurors] a law," as that would not be a "meaningful" response to the jury's "fact specific" question about a person who "is guilty in concert, but who is a non-shooter." (Tr. at 778.) Petitioner's counsel repeated his objection to the use of "any examples," because "given the best view of the evidence from the perspective of the defense, [Ms. Lacayo's testimony] . . . didn't present any evidence of accessorial conduct on behalf of the second individual who is with the person who [Lacayo] said defensively shot Gonzaga." (Tr. at 779.) The trial court rejected Petitioner's objection, noting that the jury was not asking about "a factless,

baseless hypothetical for their own curiosity." (Tr. at 779.)

When the jury returned to the courtroom, the trial court reiterated that to establish that Petitioner had acted "in concert" the People had to "prove two things beyond a reasonable doubt." First, they had to prove that "each person," sharing a "common purpose," had the required "mental state," in this case, an intent to cause "serious physical injury or to kill a person." (Tr. at 780, 783.) Second, they had to prove that Petitioner "either did an act to further the common purpose, requested and directed another to do an act to further the common purpose, or intentionally aided another to further the common purpose." (Tr. at 781.) The trial court then repeated its warning that neither "mere presence" at the scene nor mere "associat[ion]" with the other actors would suffice. (Tr. at 781-82.)

The trial court told the jurors that, although the People had to prove that Petitioner possessed the requisite intent and that he had carried out, requested, or "intentionally aided in any manner the commission of the charged crime," the People were not required to prove "the identity of a person with whom the petitioner may have acted in concert." Nor did the People have to "prove how

many persons were in concert during the criminal transaction." (Tr. at 781-82.) The trial court also reminded the jurors that "[t]he degree or extent to which a person intentionally participates in the crime is immaterial," as the law does not require "the jury to determine whether one of a series of participants is more guilty than another." (Tr. at 782-83.)

The trial court then addressed the jury's "very specific question about what can a non-shooter do if he's guilty of in concert participation in a crime like this." (Tr. at 783.) The trial court described a hypothetical murder in a hallway, where one person, "peeking out" from behind a door, "sees the victim come [into] the hallway and says, 'He's here,'" and then "somebody else steps into the hallway and shoots him." The court told the jury that, under those circumstances, "the observer" acted "in concert" and could be convicted even though he was "not the shooter." (Tr. at 783.)

The trial court offered a second hypothetical involving a two-state murder. The trial court explained that if "a person in California wants somebody in New Hampshire killed and makes arrangements to pay the person in New Hampshire and pays the person, maybe even sends him the gun or money to buy a gun," a jury could find "that the

person who never leaves California, who never touches a gun, who [n]ever fires a gun, who never sees the victim of the shooting, is in concert with the shooter in New Hampshire." (Tr. at 784.) Again, the trial court cautioned that "[m]ere presence doesn't count. You have to do something. Having a common mental purpose." (Tr. at 784.)

After the supplemental charge, Petitioner's counsel repeated his objection to the trial court's examples. Referring to the hallway example, he stated, "Just because someone gives a glance, I don't think that's enough for acting in concert. . . . [I]t has to be a glance that means something." (Tr. at 784-85.) The trial court responded that the example made that clear but agreed to "say it again." (Tr. at 786.) The trial court then told the jury that "an inadvertent act doesn't count." The trial court added that, although "[a] glance or a nod of the head" intended to "communicate information that furthers the common purpose" could support a finding of accessorial liability, "an inadvertent twist or no[d] or a shake of the head that's not done for [that] purpose" could not. (Tr. at 787.) Petitioner's counsel made no further objections to the court's hypothetical examples.

On the third day of its deliberations, the jury sent a note "request[ing] a statement explaining whether

accompanying a man to a confrontation, a man whom one knows to be armed and that uses the weapon, is sufficient to establish one's intent that the weapon be used for murder, assault or any other unlawful purpose." (Tr. at 797.) Petitioner's counsel asked the court to tell the jury that "the direct response to the question is no," because "accompanying someone who you know to be armed, unless you have the intent to use that arm is insufficient." (Tr. at 800.) The trial court stated that it appeared that the jurors were "pre-supposing in their note, knowledge on the part of an unarmed person" that "the unarmed person is accompanying an armed person" to a "confrontation." (Tr. at 800.) Because "they are positing that situation," the court proposed to recharge them on the "tools" they could use in determining "what somebody intends or knows," and that they "could use certain facts such as the nature of the weapon to decide what the intent is, if any, of the person accompanying the armed person to a confrontation." (Tr. at 800-01.)

Petitioner's counsel then asked the court to remind the jury that the unarmed man not only had to "share the intent" but had to "intentionally aid" the shooter. While counsel acknowledged that the unarmed man "absolutely" could be found guilty as an accomplice if he provided

assistance such as "being a target," a "distraction," or "a pointer out," he also insisted that the court remind the jury of the "intentional[] aid" requirement. (Tr. at 803.)

When the jurors returned to the courtroom, the court instructed them as follows:

> You heard me say in the acting in concert explanation that mere presence is not sufficient, that the People have to prove beyond a reasonable doubt a mental element, intent, and the doing of something that assists. Your word is "confrontation." A confrontation with a weapon is unlawful. If the weapon is a loaded firearm, the type of confrontation and the potential result becomes more defined.
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> One who accompanies an armed man to a confrontation can be found by a jury, if it chooses to do so, guilty of being in concert with the one who physically possesses and then uses the pistol for any unlawful purpose that the user of the weapon employs during the confrontation.
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> [The charge] on intent that I read on Tuesday, says that the jury, if it chooses to do so, if it makes sense in the context of whatever facts you folks are finding, the law on intent says in part, as I explained on Tuesday, that a jury can find that a person intends the normal, natural and logical consequences of what their [sic] actions are and what the actions are of those with whom they may be in concert.
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> Intent, you know, is a secret operation of the mind and you can look to what somebody did before, during and after on what they intended. In the context of this kind of situation where you're analyzing the nature of the confrontation, the nature of the weapon possessed, only if you decide that a person's presence was for the purpose of in someway assisting can the person be found liable for in concert possession.
>
> But this is a unique situation where presence could be enough for the second element of the in concert, provided a jury beyond a reasonable doubt decided that the presence was

> for some purpose to assist the goal, the common purpose. It's any purpose and any assistance, however great or small: being an alternate target; being a pointer out, as that example I gave you yesterday or the day before; being a distraction; anything. But it has to be done beyond a reasonable doubt, the presence of a non-armed person at a confrontation with weapons or has to be for purposes in some fashion, leading [sic]. It's up to you folks, that's why you are here.

(Tr. at 806-08.)

Petitioner's counsel objected to the above-quoted language, because it "precluded the idea that the person going to the confrontation with the gun was only bringing the gun for self-defense," and thus the jury would not be "allowed to consider the fact that it was not possession with intent to use unlawfully." (Tr. at 810.) The trial court overruled counsel's objection, reasoning that, because the jury's note was limited to a situation where the gunman goes to the confrontation "purposefully," there was "no justification defense permissible under that circumstance." (Tr. at 810-11.)

Subsequent History

Petitioner's conviction was affirmed by the Appellate Division on June 16, 2005. See People v. Jones, 797 N.Y.S.2d 63 (N.Y. App. Div. 2005). On January 11, 2002,

the Court of Appeals denied Petitioner's leave to appeal. People v. Jones, 836 N.E.2d 1159 (2005). On March 20, 2006, the Supreme Court of the United States denied certiorari. Jones v. New York, 547 U.S. 1026 (2006) (summary order).

On June 11, 2006, Petitioner filed a motion pursuant to New York Criminal Procedure Law ("CPL") § 440.10 with the trial court seeking to vacate the judgment of conviction. In that motion, Petitioner argued that his trial counsel was ineffective because he failed (1) to request that the prosecutor deliver a justification charge to the grand jury, (2) to impeach the victim with a prior statement contained in a police report, and (3) to request a jury instruction based on CPL § 60.22 that the defendant could not be convicted upon the uncorroborated testimony of an accomplice. On September 28, 2006, the trial court denied the motion on the grounds that counsel was not ineffective for failing to request that the jury be charged pursuant to CPL § 60.22 because "[n]o reasonable view of the evidence supports the conclusion that the [ ] victim was an accomplice" of Petitioner, Petitioner's testimony to the grand jury obviated the need for a justification charge being given to the grand jury, and counsel's failure to use the police report to impeach Mr. Gonzaga was not

ineffective because the individual giving the report admitted that she was not "really sure" of what had been said and because the statement was not in fact inconsistent with Mr. Gonzaga's testimony nor with the Petitioner's guilt. (Decision on Motion to Vacate Judgment ("440.10 Decision"), attached as Ex. J to Danzig Decl. in Opposition to the Petition.) On February 7, 2007, the Appellate Division denied the petitioner's application for leave to appeal the 440.10 Decision. People v. Jones, M-6217, 2007 N.Y. App. Div. LEXIS 1823 (N.Y. Supp. Feb. 7, 2007).

On July 23, 2007, Petitioner applied to this Court for a writ of habeas corpus.

II. DISCUSSION

A. AEDPA Standard

"Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1), a federal court may not grant a state prisoner's habeas application unless the relevant state-court decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Knowles v. Mirzayance, -- U.S. --, 129 S. Ct. 1411, 1419 (2009) (quoting § 2254(d)(1)). Accordingly, a federal habeas court's initial task is to

identify what "clearly established Federal law" a habeas petitioner contends a state court controverted or misapplied. That task necessarily involves habeas courts' essential Article III functions: saying what the law is. See Williams v. Taylor, 529 U.S. 362, 411 (2000).

In making such a determination, a federal habeas court is limited to determinations made "by the Supreme Court of the United States" only. 28 U.S.C. § 2254(d)(1) (emphasis added); see also Williams, 529 U.S. at 412 ("[Section] 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence."); Rodriguez v. Miller, 537 F.3d 102, 109 (2d Cir. 2008) ("AEDPA itself tells us that the decisions of the courts of appeals cannot provide clearly established federal law."). "[T]he holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision" need only be considered. Williams, 529 U.S. at 412; Carey v. Musladin, 549 U.S. 70, 74, 77 (2006); see also Teague v. Lane, 489 U.S. 288, 308-310 (1989); Rodriguez, 537 F.3d at 106-07.

Once the federal habeas court determines the applicable governing legal principles--that is, the legal principles constituting clearly established Federal law, as determined by the Supreme Court of the United States--it

must then consider whether the outcome of the habeas petitioner's state court adjudication was contrary to or involved an unreasonable application of those principles. Pursuant to the "contrary to" clause of § 2254(d)(1), a federal habeas court may grant the writ "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412-13. Under the "unreasonable application" clause of § 2254(d)(1), "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. "The question 'is not whether a federal court believes the state court's determination' . . . 'was incorrect but whether that determination was unreasonable--a substantially higher threshold.'" Knowles, -- U.S. --, 129 S. Ct. at 1420 (quoting Schriro v. Landrigan, 550 U.S. 465, 473 (2007)) (emphasis added). Finally, "evaluating whether a [state court's federal law] rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway [state] courts have in

reaching outcomes in case-by-case determinations." Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).[1]

B. Petitioner's Arguments for Collateral Relief

The Petitioner argues that he is entitled to habeas relief because the state court decisions[2] unreasonably applied[3] clearly established federal law when they found no error in the trial court's (1) jury instruction on the People's burden of proof; (2) jury instructions on accessorial liability; (3) refusal to deliver a jury charge on justification; and (4) denial of Petitioner's claim of ineffective assistance of counsel in the 440.10 Decision.

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[1] The Report does not articulate or apply the correct AEDPA standard, in that the grounds on which the Report recommends granting Petitioner habeas relief are based on Court of Appeals holdings and, in some cases, even New York State Court holdings. See Report at 28-33. While certainly helpful for determining the contours of clearly established federal law, such holdings do not constitute clearly established federal law for § 2254(d)(1) purposes.

[2] Petitioner does not identify which state court decision he contends was contrary to or unreasonably applied clearly established federal law. Petitioner seems to contest the Appellate Division's decision affirming his conviction. In any event, because all the state court decisions ultimately reached consistent results, this Court construes the Petition broadly and considers Petitioner to lodge an attack on the general findings of all the state court decisions.

[3] This Court does not understand the Petitioner to argue that the state court decisions were contrary to clearly established federal law. Nor does the Report so find.

(See Habeas Petition ¶ 13.) Primarily, Petitioner contends that those four issues constituted unreasonable applications of due process principles.[4]

i. Reasonable Doubt Charge

Petitioner contends that the state court decisions affirming the trial court's inclusion of the "two-inference" instruction and reference to the preponderance of the evidence standard for fact-finding in the jury charge were unreasonable applications of due process principles. However, no clearly established due process rule, as determined by the Supreme Court, proscribes such references in jury charges.

In In re Winship, 397 U.S. 358, 364 (1970), the Supreme Court stated the now well-established rule that the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The rule "symbolizes the significance that our society attaches to the criminal

[4] The Petition does not articulate precise legal grounds upon which Petitioner contends he is entitled to the Writ. The Court has construed Petitioner's arguments in the light most favorable to Petitioner--as did the Report--while taking into account the AEDPA standard by which his arguments must be considered.

sanction and thus to liberty itself." Jackson v. Virginia, 443 U.S. 307, 315 (1979). The reasonable doubt standard "provides concrete substance for the presumption of innocence--that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Winship, 397 U.S. at 363 (internal quotation marks omitted).

However, due process does not require that a uniform articulation of the reasonable doubt standard be given in a jury charge in every case. The Supreme Court's teachings on this point are clear:

> The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Cf. Hopt v. Utah, 120 U.S. 430, 440-441 (1887). Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, see Jackson v. Virginia, 443 U.S. 307, 320, n. 14 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Cf. Taylor v. Kentucky, 436 U.S. 478, 485-486 (1978). Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." Holland v. United States, 348 U.S. 121, 140 (1954).

Victor v. Nebraska, 511 U.S. 1, 5 (1994). And in Estelle v. McGuire, 502 U.S. 62, 72-73 & n.4 (1991), the Supreme Court reaffirming that the single standard for reviewing

the constitutionality of jury instructions is whether a particular instruction created a "reasonable likelihood" that the jury misapplied the People's burden. See also Boyde v. California, 494 U.S. 370, 378-80 (1990).

No Supreme Court decision has considered whether "two-inferences" charges or, for that matter, instructions to a jury that it may apply the preponderance of the evidence standard to factfinding, comport with due process. Thus, Petitioner has a particularly difficult task in arguing that the state court decisions unreasonably applied due process principles in this case. See Yarborough, 541 U.S. at 664 ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.").

Of Supreme Court decisions that have considered whether particular reasonable doubt instructions comported with due process, cf. Cage v. Louisiana, 498 U.S. 39, 41 (1990) (per curiam), no decision provides a holding even remotely similar to the type of charge given by the trial court in this case. The Report suggests that some federal courts have held that "two inference" instructions violate due process. See Report at 22. While that may be so, the Supreme Court of the United States has never considered the issue, and the Court's more general pronouncements on the

constitutionality of charge wording emphasize that alternative iterations of the reasonable doubt standard are permitted. See Victor, 511 U.S. at 20 (favoring "an alternative definition of reasonable doubt"). Thus, there is simply no clearly established federal law, other than general due process principles, which Petitioner may complain was unreasonably applied by the state courts.[5]

As to general due process principles, this Court concludes that the state court decisions affirming the constitutionality of the trial court's jury instructions on the People's burden were not unreasonable applications. As noted above, the trial court's jury instructions repeatedly emphasized that the People must prove all elements of the charges beyond a reasonable doubt. (Tr. at 716-17, 720-23, 725, 733-37, 740, 744, 747, 751-52, 792.) This Court finds that the numerous iterations of the reasonable doubt standard, not to mention the detailed definition provided (Tr. at 722-23), constituted helpful guidance to the jury

[5] The Court of Appeals certainly does not consider two-inferences charges and preponderance of the evidence factfinding to be unconstitutional. See United States v. Delibac, 925 F.2d 610, 614 (2d Cir. 1991); United States v. Khan, 821 F.2d 90, 92 (2d Cir. 1987); United States v. Gatzonis, 805 F.2d 72 (2d Cir. 1986); United States v. Viafara-Rodriguez, 729 F.2d 912, 913 (2d Cir. 1984); see also Brown v. Greene, -- F.3d --, 2009 WL 2445401, at **3-4 (2d Cir. Aug. 11, 2009) (discussing the Court of Appeals' consideration of this issue in the context of an ineffective assistance of counsel claim).

and correctly articulated the state of the law. Thus, the state court decisions upholding the jury instructions were well within the bounds of reasonable applications of--and certainly were not contrary to--clearly established federal law as determined by the Supreme Court of the United States.

ii. Accessorial Liability Charge

Petitioner contends that the state court decisions unreasonably applied clearly established due process standards when they upheld the trial court's instruction to the jury by way of five hypothetical examples to illustrate the People's accessorial liability theory. However, Petitioner's argument is amorphous and cannot be tethered to any specific due process rule proscribing or defining the limits to which hypothetical examples may be used in jury instructions. (Petition at ¶ 13.) The Report notes that hypothetical explanations are disfavored, though not unconstitutional, and concludes that the trial court's charge "created at least a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution." (Report at 47.)

The Report--and Petitioner, this Court must assume--rely on Estelle, 502 U.S. at 72, which considered whether a

jury instruction on the role of prior bad act evidence so infected the entire trial that the resulting conviction violated the defendant's due process rights. (Report at 47.) As an initial matter, Estelle found that the jury instruction in that case did not violate due process. Thus, it does not provide a particularly helpful guidepost by which to judge unconstitutional jury instructions. It does not allow this Court to analogize the instructions in this case with an instruction found to violate due process. Instead, and more importantly, Estelle teaches that for an instruction to violate due process, it must be more than undesirable, erroneous, or even universally condemned. Id. at 72. Due Process requires fundamentally fair jury instructions, but the category of infractions that violate the fundamental fairness test is extremely limited. Id. at 73 (citing Dowling v. United States, 493 U.S. 342, 352 (1990)). Finally, as noted above, "[i]t is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Id. at 72 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). The cases cited in the Report do not

constitute clearly established federal law as determined by the Supreme Court.[6]

Judged according to the Estelle teachings, Petitioner's argument that the state court decisions upholding the trial court's instruction on accessorial liability were unreasonable applications of clearly established federal law undoubtedly fails. The jury instructions describing the New York State law on accessorial liability were correct. (See Tr. at 726-29; 780-84; 806-08; see also Report at 39, 42 (conceding the instructions were correct).) Also, the instructions were not conflicting--not that incorrect or conflicting instructions on state law would necessarily warrant granting a writ of habeas, Estelle, 502 U.S. at 71-72, but

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[6] United States v. Dove, 916 F.2d 41, 46 (2d Cir. 1990), found that certain jury instructions or the lack thereof made the charge "unbalanced" and "prejudicial," but Dove did not articulate a constitutional standard by which it judged the instructions. The Dove court certainly was not applying a clearly established federal law standard for judging violations of due process, as determined by the Supreme Court, as the Court must in this case. Thus, Dove is unhelpful. As are United States v. Salameh, 152 F.3d 88, 143 (2d Cir. 1998); United States v. Gaggi, 811 F.2d 47, 62 (2d Cir. 1987); United States v. Gleason; 616 F.2d 2, 14 (2d Cir. 1979); and United States v. Dizdar, 581 F.2d 1031, 1037 (2d Cir. 1978). None of those cases involved a procedural posture involving habeas review of a state court decision. Thus, it cannot be said that those decisions looked only to clearly established federal law, as determined by the Supreme Court, to consider whether the particular jury instructions violated due process.

at least those facts would tend to strengthen Petitioner's claim of jury confusion and thus unfairness.

Nor for that matter did the inclusion of the hypothetical examples produce a reasonably likelihood that the jury misapplied state law. While the jury obviously had some confusion on the precise contours of the accessorial liability theory, as evidenced by the two questions submitted by the jury during their deliberation, this Court finds nothing particularly extraordinary or unbalanced about the trial court's explanations by way of example. This Court cannot help but conclude that the jury correctly applied the law because the trial court's explanation of the law, taken in its entirety, was correct. See Richardson v. Marsh, 481 U.S. 200, 211 (1987) (emphasizing the rule that juries are presumed to follow their instructions).[7]

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[7] Relying primarily on Second Circuit and Southern District of New York cases, (e.g., Report at 36-41), the Report concludes that the trial court's hypothetical examples created a reasonable likelihood that the jury misapplied the law. This Court disagrees with that conclusion. The examples were reasonable attempts to explain the concept of acting in concert liability.

The first three hypothetical examples--describing a gunfight, a warehouse burglary, and an orchestra--exemplified the state of mind and types of conduct sufficient to satisfy the accessorial liability theory. The examples were concededly accurate illustrations of N.Y. Penal Law § 20.00 and were not objected to during the trial. (See T. 754-58.) *(continued . . .)*

As such, this Court simply cannot find any clearly established federal law which was unreasonably applied when the state court decisions upheld the trial court's instructions by way of five hypothetical examples.

iii. Non-delivery of the Justification Charge

Petitioner next contends that the state courts unreasonably applied clearly established federal law when they upheld the trial court's refusal to deliver a

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(. . . continued) The two hypothetical examples offered in response to the jury questions--describing a hallway murder and a two-state murder--although objected to, were not unfair, unbalanced, or particularly capable of producing a likelihood that the jury would misapply the law. Particularly in light of Petitioner's complaint that the first example gave the jury the wrong impression that a mere "glance" is "enough for acting in concert" (Tr. at 784-85), the trial court instructed the jurors--as it did before Petitioner asserted his objection--that simply being present, or being present and acting inadvertently, is insufficient. The trial court emphasized that the glance or nod must be done for the purpose of "communicat[ing] information that furthers the common purpose," (Tr. at 786-87), and "mere presence is not sufficient, that the People have to prove beyond a reasonable doubt a mental element, intent, and the doing of something that assists," (Tr. at 806-08). Whether or not "[t]he wiser course at that juncture would have been to merely repeat the law on accomplice liability," (Report at 42), these explanations were neutral and balanced and, most importantly, constituted alternative iterations of the state law. Considering all of the trial court's instructions on accessorial liability as a whole, this Court concludes that they accurately conveyed New York's law on accessorial liability and produced no likelihood that the jury would misapply that law.

justification jury instruction. Petitioner contends, and the Report concludes, that the state court decisions unreasonably applied due process standards when upholding the district court's refusal. The Report concludes that the refusal "so infected the entire trial that the resulting conviction violates due process." (Report at 47 (citing Henderson v. Kibbe, 431 U.S. 145, 154-55 (1977).)

In regards to a refusal to charge argument, the Court of Appeals has determined a habeas petition under 28 U.S.C. § 2254 is warranted only if a petitioner shows (1) that he was "entitled to a justification charge" under New York law, (2) that the failure to give the charge resulted in a denial of due process, and (3) that the relevant reviewing state court's contrary conclusion constituted an unreasonable application of clearly established federal law, as determined by the Supreme Court. Jackson v. Edwards, 404 F.3d 612, 621 (2d Cir. 2005) (citing Davis v. Strack, 270 F.3d 111, 124 (2d Cir. 2001)). The Report answers each of those questions in the affirmative. This Court disagrees as to the first requirement and, accordingly, determines that the trial court, and the state court decisions upholding the trial court's refusal, did not violate clearly established federal law.

Petitioner was not entitled to a justification charge under New York law. In New York, a person is justified in using "deadly physical force" against another when he "reasonably believes that such other person is using or about to use deadly physical force." N.Y. Penal Law § 35.15(2)(a). Even under those circumstances, a person may not use deadly physical force (with certain exceptions not relevant here) "if he or she knows that with complete personal safety, to oneself and others[,] he or she may avoid the necessity of so doing by retreating." Id.; see also People v. Goetz, 68 N.Y.2d 96, 106 (1986). In determining whether a justification charge is warranted, the trial court must assess the evidence in the light most favorable to the defendant. Blazic v. Henderson, 900 F.2d 534, 540 (2d Cir. 1990) (citing cases from the New York Court of Appeals). And a defendant has a right to assert inconsistent defense theories. See People v. Steele, 26 N.Y.2d 526, 529 (1970); see also Mathews v. United States, 485 U.S. 58, 63-64 (1988). Nonetheless, "there must exist a reasonable view of the evidence from which a jury could conclude that the defendant's acts were justified. [The] court is not required to adopt an artificial or irrational view of the evidence in deciding whether a justification

charge is warranted." Blazic, 900 F.2d at 540 (citing People v. Butts, 72 N.Y.2d 746, 750 (1988)).

No reasonable view of the People's evidence, viewed in the light most favorable to Petitioner, permitted the jury to conclude that Petitioner's acts were justified. Mr. Gonzaga testified that when he was confronted by Petitioner and his companions, he (Gonzaga) was unarmed and posed no threat to anyone. (Tr. at 330, 338, 381.) Furthermore, Mr. Gonzaga testified that it took only one or two seconds for Petitioner to draw his gun and start firing. (Tr. at 338.) And, although Mr. Leslie did not witness the shooting, he, too, testified that Gonzaga was unarmed at the time. (Tr. at 393, 397.) Mr. Gonzaga and Mr. Leslie's testimony was corroborated by the fact that no weapon was recovered from or near Mr. Gonzaga as he lay wounded on the ground. (Tr. at 482-86.) Even Petitioner, in his Grand Jury testimony, never claimed that Mr. Gonzaga was armed or had threatened anyone. (See Tr. at 509, 513-20, 523-24, 527, 532-36.)

Similarly, the evidence adduced at trial by Petitioner, even if it were the only evidence credited by the jury, would not have permitted the jury to conclude that Petitioner's acts were justified. Petitioner's sole witness, Ms. Lacayo, testified that the shooting involved only three men: two black men who were walking together on

First Avenue, and a Latino man who was walking alone across 112th Street. (Tr. at 554-56, 558-59, 563-64, 566, 591, 593.) Although Ms. Lacayo testified that the Latino man drew his gun before one of the black men did (Tr. at 556, 567), she later testified that the two men drew their guns simultaneously, (Tr. at 593). Ms. Lacayo was unable to identify petitioner at trial, (Tr. at 589), and her testimony that both black men were tall, (Tr. at 559), would seem to rule out Petitioner, who is apparently only five feet, three inches tall (See Pet. App. Br. at 10; see also Report at 4 n.5.). Petitioner's own counsel emphasized this point in his closing arguments, asking Petitioner to stand up for the jury to see his size, thus ruling out the possibility that Petitioner could have been the black man shooter. (Tr. at 655-56.)[8] The jury could not reasonably have concluded that Petitioner was the black man who drew his gun after or at the same time that the Latino man drew his.[9] Accordingly, Petitioner was not entitled to a justification charge under New York Law.

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[8] This Court notes that Petitioner advanced this same argument in his appellate brief. See Danzig Decl., Ex. A (Pet. App. Br. at 16) ("Lacayo observe[d] that all three men on the corner were tall (TR.599) – which [petitioner] is not.").

[9] Ms. Lacayo's testimony was meant to show that Petitioner was not even present at the scene of *(continued . . .)*

Because Petitioner was not entitled to a justification charge under New York law, the trial court's refusal to deliver such a charge did not violate Petitioner's right to due process, and it was certainly not an unreasonable application of due process for the state courts to uphold the decision. "[D]ue process does not require the giving of a jury instruction when such charge is not supported by the evidence." Blazic, 900 F.2d at 541 (citing Hopper v. Evans, 456 U.S. 605, 611 (1982)).

iv. Effective Assistance of Counsel

Finally, Petitioner contends that the trial court unreasonably applied clearly established federal law when it determined, in the context of the § 440.10 Decision, that Petitioner was not denied effective assistance of counsel. I agree with the Report's rejection of this theory and, in accordance with the reasons set forth therein, I conclude that the § 440.10 Decision was not an unreasonable application of clearly established federal law.

(. . . continued) the shooting. That Lacayo failed to persuade the jurors of the validity of that theory, however, does not mean that she persuaded them that Petitioner was the black man shooter. In any event, the jury certainly discredited her testimony in light of the conviction it returned.

III. CONCLUSION

For the reasons set forth herein, the Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254 is DENIED. A certificate of appealability will issue because "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." See Slack v. McDaniel, 529 U.S. 473, 475 (2000). The Clerk of Court shall mark this action closed and all pending motions denied as moot.

Dated: New York, New York
August 25, 2009

Loretta A. Preska, U.S.D.J.